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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 8

THOMAS QUINN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals reversing the judgment of conviction and remanding the case for a new trial (R. 163) is reported at 203 F. 2d 20. The opinions of Judge Kirkland (R. 63, 66) denying certain pre-trial motions filed by petitioner and 15 other individuals who were indicted for contempt of Congress appear at 95 F. Supp. 1010, 1012. The opinion of Judge Kirkland in the District Court rendered at the conclusion of the trial and holding petitioner guilty (R. 130) is unreported.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1254. The petition for writ of certiorari was granted on

June 7, 1954. This case was consolidated for the purposes of argument with *Emspak* v. *United States*, No. 9, this Term, by order of the Court, 74 S. Ct. 861.

Statutes, Resolutions and Rules Involved

1. 2 U. S. C. 192, R. S. 102, as amended, provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

2. Rule XI(1)(q)(2) of the Rules of the House of Representatives, as amended by Section 121(b) of the Legislative Reorganization Act of 1946, c. 753, 60 Stat. 828, and thereafter adopted by the House of Representatives (H. Res. 5, 81st Cong., 1st Sess., 95 C. R. 10 (1949), provides:

> "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.
>
> "The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

"For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member."

The language in the amendment of Rule XI by the Legislative Reorganization Act is substantially the same as the House resolution which initiated and continued the House committee in effect until the establishment of the present committee.[1]

3. Rules of Criminal Procedure:

"RULE 6. THE GRAND JURY.

(b) *Objections to Grand Jury and to Grand Jurors.*

(2) *Motion to Dismiss.* A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment."

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[1] H. Res. 282, 75th Cong., 3d Sess., 83 C. R. 7568, 7586 (1938); H. Res. 26, 76th Cong., 1st Sess., 84 C. R. 1098, 1128 (1939); H. Res. 321, 76th Cong., 3d Sess., 86 C. R. 572, 605 (1940); H. Res. 90, 77th Cong., 1st Sess., 87 C. R. 886, 899 (1941); H. Res. 420, 77th Cong., 2d Sess., 88 C. R. 2282, 2297 (1942); H. Res. 65, 78th Cong., 1st Sess., 89 C. R. 795, 810 (1943); H. Res. 5, 79th Cong., 1st Sess., 91 C. R. 10, 15 (1945); H. Res. 5, 80th Cong., 1st Sess., 93 C. R. 38 (1947).

"RULE 12. PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS.

(b) *The Motion Raising Defenses and Objections.*

(1) *Defenses and Objections Which May Be Raised.* Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) *Hearing on Motion.* A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct."

Statement

1. The proceedings before the subcommittee of the House Committee on Un-American Activities.

The petitioner, Thomas Quinn, was an employee of the Westinghouse Electric Corporation in East Pittsburgh, Pennsylvania, and a field representative of the United Electrical, Radio and Machine Workers of America (hereafter referred to as UE or the Union), a national labor union representing employees in the electrical, radio and machine industry. He appeared pursuant to subpoena on August 11, 1949, before four members of the Committee on Un-American Activities of the House of Representatives. The hearings in which the petitioner testified were subsequently printed by the committee and are contained in a pamphlet entitled, *Hearings Regarding Communist Infiltration of Labor Unions—Part 1 (Local 601, United Electrical, Radio and Machine Workers of America, CIO, Pittsburgh, Pa.)*, 81st Cong., 1st Sess.[2]

Petitioner was subpoenaed to appear on August 10, 1949, together with Thomas J. Fitzpatrick and Frank Panzino, fellow employees in the Westinghouse East Pittsburgh plant and fellow members and officers of UE Local 601. All three UE members answered to their subpoenas on August 10, 1949, as directed. Fitzpatrick and Panzino testified before the committee that day and petitioner testified before the committee the following morning, August 11, 1949.

At the outset of the hearings counsel for the committee formally announced that the purpose of the hearing was to inquire into the question of Communist affiliation of certain members of Local 601 of the UE in connection with "the advisability of tightening present security require-

[2] These hearings constitute Government Exhibit One, and by agreement of the parties were not printed in the joint appendix in the court below.

ments in industrial plants working on certain Government contracts" (1 *Infiltration—Labor Unions* 541). After several preliminary questions as to employment and membership in the UE, Fitzpatrick, Panzino and petitioner were asked questions concerning alleged membership in the Communist Party. Fitzpatrick was the first of the three UE members to be asked these questions and declined to answer the questions by relying upon "the First and Fifth Amendments" (R. 110) as well as the "First Amendment to the Constitution supplemented by the Fifth Amendment" (R. 107). Both Panzino and petitioner, following Fitzpatrick's testimony, refused to answer the identical questions, specifically adopting as their own the grounds relied upon by Fitzpatrick.

Petitioner specifically adopted the grounds asserted by Fitzpatrick for refusing to answer the questions in the following manner (R. 97-98):

> "Mr. Tavenner. Are you now or have you ever been a member of the Communist Party?
>
> Mr. Quinn. I would like to make a statement along the lines that Mr. Fitzpatrick made yesterday in regard to a question of that nature. I feel that the political beliefs, opinions, and associations of the American people can be held secret if they so desire.
>
> Mr. Wood. And for those reasons you decline to answer the question?
>
> Mr. Quinn. I didn't say I was declining to answer the question. Before I do answer the question, I should like to say that I support the position taken by Brother Fitzpatrick yesterday.
>
> Mr. Wood. Did you hear his statement yesterday?
>
> Mr. Quinn. Yes; I did.
>
> Mr. Wood. Do you support it in its entirety?
>
> Mr. Quinn. In its entirety.
>
> Mr. Wood. Is there anything else you want to add to it?
>
> Mr. Quinn. No; I don't.
>
> Mr. Wood. Will you accept it as the expression of your views, then?

Mr. Quinn. You may. I may add I feel I have no other choice in this matter, because the defense of the Constitution, I hold sacred. I don't feel I am hiding behind the Constitution, but in this case I am standing before it, defending it, as small as I am.

Mr. Wood. Having made that statement and subscribed to the sentiments expressed by the witness yesterday to whom you referred, will you now answer the question whether you are now or have ever been a member of the Communist Party?

Mr. Quinn. I hold that the Constitution holds sacred the rights of people——

Mr. Wood. You have stated your position. Having enunciated your sentiments and your position, will you now answer the question whether you are now or ever have been a member of the Communist Party, or do you decline to answer.

Mr. Quinn. I decline to discuss with the committee questions of that nature.

Mr. Wood. Proceed, Mr. Tavenner.

Mr. Tavenner. I believe in the light of that answer it is not necessary to ask you any further questions relating to those matters, so I will ask you this: Do you know Mr. James J. Matles?

Mr. Quinn. Yes."

Petitioner, together with fifteen other individuals, was indicted for violation of 2 U. S. C. 192, by a grand jury empaneled on October 3, 1950. Of the sixteen individuals thus indicted the following, in addition to petitioner, were officials or members of the union: Thomas J. Fitzpatrick, James J. Matles, Julius Emspak, Frank Panzino, Talmadge Raley and Esther Tice. Of these seven individuals, only two, the petitioner and Julius Emspak were found guilty of contempt. The others were all subsequently acquitted by the district court.

The citations for contempt of these seven individuals resulted from three separate groups of hearings before subcommittees of the committee. The petitioner appeared together with Thomas J. Fitzpatrick and Frank Panzino at the first group of hearings. At the second group of

hearings, held on December 5 and 6, 1949, Julius Emspak and James J. Matles testified. As a result of a third Un-American Activities Committee hearing, held from July 12 to July 15, 1950, Talmadge Raley and Esther Tice were indicted.[3]

2. The Proceedings Below.

Subsequent to their testimony Fitzpatrick, Panzino and petitioner were indicted for violation of 2 U. S. C. 192, by a grand jury empaneled on October 3, 1950.[4]

Petitioner was indicted upon a single count for refusal to answer a question as to "whether he was or had ever been a member of the Communist Party" (R. 3).

On December 17, 1950, petitioner filed a motion to dismiss the indictment. The grounds of this motion included the contentions that the questions asked exceeded the bounds of legislative inquiry and were not pertinent to any question properly under inquiry by the committee; that the statutory provision invoked by the indictment inherently and as applied exceeded the bounds of the constitutional power of investigation; that this statutory provision and

---

[3] The August and December, 1949, hearings are part of a series of hearings involving UE personnel and officers which together with a hearing held in August, 1950, have been published in three consecutively numbered pamphlets entitled, *Hearings Regarding Communist Infiltration of Labor Unions.* We refer to these hearings, as we did in our brief in the *Emspak* case, as "1-3 Infiltration—Labor Unions." The hearings of July, 1950, referred to in the text, were published by the committee as *Hearings Regarding Communist Activities in the Cincinnati, Ohio, Area—Part 1.* We refer to these hearings as "Cincinnati Area."

[4] Fitzpatrick and Panzino were subsequently tried and acquitted by the District Court. In *United States* v. *Fitzpatrick*, 96 F. Supp. 491, Judge Morris upheld Fitzpatrick's statement as a valid assertion of his Fifth Amendment privilege and entered a judgment of acquittal. Similarly in *United States* v. *Panzino*, Criminal No. 1747-50, unreported, District of Columbia, the late Judge Goldsborough upheld Panzino's assertion and entered a judgment of acquittal.

House Resolution 5, inherently and as applied, are violative of the First Amendment, are unconstitutionally vague and violate the constitutional privilege against self-incrimination (R. 4).

An affidavit in support of the motion to dismiss which the government did not controvert charged that all of the these hearings in which the Union, its officers and its members were involved were characterized by an exertion of unconstitutional powers and by "objectives totally unrelated to the legitimate legislative business of the committee or the House of Representatives" (R. 7, 8). It charged that the hearing of August 9, 1949, had "the objective of interfering with and influencing the outcome of a local union election then pending in Pittsburgh, Pennsylvania" (R. 8); that the purpose and timing of this hearing were determined after consultation with and to give support to an "inner union clique" (R. 10); that the hearing which gave rise to the *Emspak* case had as its actual objective an attempt "to disclose a possible violation of Section 80 of the Criminal Code for false statements made in the so-called Taft-Hartley non-Communist affidavits" (R. 11); and that the hearings of July, 1950 (*Cincinnati Area*), were held in order to serve as a privileged forum for a series of partisan anti-labor articles, and that the entire questioning of one of the witnesses, a union member, was based upon a document subsequently admitted to be a forgery by a committee member (R. 12-14).

A second affidavit filed by the petitioner (R. 19-33) related to petitioner's claim of privilege under the Fifth Amendment, indicating that on the basis of newspapers, reports and statements of members of the committee, including the chairman, prior to the time of hearing, it was clear that among the purposes of the investigation was an inquiry into whether the petitioner was allegedly affiliated or associated with the Communist Party.

The motion further sought dismissal of the indictment, or, in the alternative, a hearing, on the ground that there were

less than twelve members of the grand jury which voted the indictment who were impartial and free from prejudice and bias against the defendant (R. 6).

Petitioner attached to the motion a series of affidavits dealing both with the claim of privilege as well as with the contention that the grand jury was illegally constituted. Thereafter, petitioner filed a supplementary affidavit attacking the qualifications of the grand jurors (R. 34).

On January 19, 1951, Judge Kirkland granted the government's motion to strike certain of the affidavits and attached exhibits dealing only with the claim of privilege upon the ground that they were not appropriate to be considered in connection with pre-trial motions. On the same day Judge Kirkland, apparently *sua sponte,* struck as legally insufficient petitioner's supplementary affidavit on the qualifications of the grand jurors (R. 34). Thereafter petitioner made an offer of proof of the allegations of fact set forth in the affidavits theretofore filed on the qualifications of the grand jurors (R. 158).

On January 26, 1951, Judge Kirkland handed down an order and opinion holding, *inter alia* that neither the circumstances recited in the motion to dismiss nor those referred to in the offer of proof with respect to the qualifications of the grand jury justified granting the relief requested by petitioner (R. 63; 95 F. Supp. 1010).

Thereafter, on January 31, 1951, Judge Kirkland filed a second opinion holding that the counts involved in the instant indictment and in several others with which he dealt simultaneously, "apparently on their face were directed to one single line of inquiry which was the specific phase of inquiry then being considered by the committee" (R. 66, 71; 95 F. Supp. 1012).

After a trial without jury the district court found the petitioner guilty, holding as a matter of law that the Fifth Amendment privilege may not be asserted by referring to

and adopting the language used by another (R. 138). Petitioner was sentenced on February 26 to a term of four to twelve months and a fine of $1,000 (R. 84). On February 27 the judgment and commitment was vacated and sentence of one year's imprisonment and $500 fine was imposed by Judge Kirkland (R. 84). On February 28 this judgment and commitment was vacated by Judge Kirkland and the original judgment reinstated (R. 85). On May 18 the judgment of February 26 was vacated by Judge Kirkland and sentence of six months' imprisonment and $500 fine was imposed (R. 85).

On January 21, 1952, an appeal from the judgment of the District Court was argued before a division of the Court of Appeals. Two months thereafter the Court of Appeals *sua sponte* ordered the appeal set down for reargument before the court *en banc* (R. 162). Pursuant to this order reargument was heard before the full court *en banc* in May, 1952. On December 19, 1952, the Court of Appeals *en banc* filed its opinions reversing the judgment of conviction and remanding the case to the district court for a new trial. There was no majority of the Court of Appeals on any one major issue in the case. The opinion of the court was rendered by Judge Prettyman for himself and Chief Judge Stephens and Judge Washington. Judge Bazelon wrote a concurring opinion in which Judge Edgerton joined. Judge Fahy wrote a separate concurring opinion. Judge Miller wrote a dissenting opinion in which Judge Proctor and Judge Clark joined.

Summary of Argument

I

Since we have already discussed in our original brief in the *Emspak* case the First Amendment issues which are presented here, we adopt the contentions there made and deal here only with certain additional matters.

The government contended that the hearings in which both petitioner and Mr. Emspak were witnesses were concerned with the danger that Communists might engage in sabotage and espionage in defense plants and that the Wood Bill (H. R. 3903) constituted the legislative subject matter of the hearings. As we shall show, the committee's resolution does not authorize an investigation into such a subject matter. But this attempt to endow the hearings with a legislative purpose must in any event fail in view of the fact that the Wood Bill does not deal with the subject matter of the hearings, Communist control of labor unions, but rather with individuals employed in defense work. The justification of the Wood Bill is unfortunate also because the bill was deemed to be unconstitutional by the Department of Justice itself. Moreover, the hearings frankly purport to deal with subversive influences in labor unions and contain no evidence at all of espionage and sabotage in defense work.

The timing of the hearings is inconsistent with their claimed purpose. The investigation of the Union which resulted in the hearing, took place prior to the reference of the Wood Bill to the committee. Although the Wood Bill was referred to the committee on March 30, 1949, the hearings were not held until August, 1949, on the eve of an important intra-union election and at the instigation of a faction within the Union.

That the purpose of the hearing was not a legislative one is shown further by the fact that the plant for which the Union was the representative was not engaged in defense work at the time the hearing was held, and by the repeated explanations of committee members during the course of the hearings that their purpose was "exposure." In addition, a hearing on the same subject matter, subsequent to that which resulted in petitioner's contempt citation, also had nothing to do with espionage and sabotage,

but was called to influence the outcome of a collective bargaining election. Finally, the House Committee on Education and Labor had fully explored the relationship of the Union to defense work and had made a report on that subject in December, 1948.

If the inquiry did have a legislative purpose, it certainly was not authorized by the resolution which has as its keystone the subject matter of propaganda and propaganda activities. The government contended in the *Emspak* case that Communists use their positions in unions for propaganda and that propaganda could possibly breed espionage and sabotage. But such contentions are not only unsupported but far-fetched. They disregard the language of the resolution and would remove all limitations on the congressional power of investigation.

The government further argued the inquiry is authorized by the resolution because a purpose of Communist propaganda might be the use of people recruited through it for industrial espionage and sabotage. But here the inquiry was not a phase of investigation into propaganda and was unrelated to that subject. Even the government could not contend that an object of Communist propaganda is espionage and sabotage. Here, too, the government has sought to expand the resolution by unacceptable techniques which would not be tolerated in any other investigative area. It should not be tolerated here because "propaganda" and "propaganda activities" are qualitatively distinct from conduct which might be undertaken by those who accept propaganda.

The fact that Congress has not expanded the committee's resolution in the face of the repeated departures from its language does not help the government. It merely emphasizes the need for this Court's intervention. This Court intervened in *United States* v. *Rumely*, 345 U. S. 41, and refused to sanction a more modest attempt to enlarge the

resolution there involved. An important consideration in the Court's limiting construction was the need to protect the First Amendment rights of the witness. That need is equally present here.

The government's view of the law invites adoption of the notion repeatedly condemned by this Court that the power of investigation even into personal and private matters is unlimited. The attempted expansion of the scope of the resolution is particularly objectionable because it is implemented by Section 192. The combination of the resolution and Section 192 imposes upon a witness before the committee the obligation to answer without a proper standard of pertinency, and turns over to the committee a penal weapon which enables it to coerce witnesses into an abandonment of their basic rights.

The government has sought to answer our objections to the scope of the resolution by argument that the words "propaganda" and "propaganda activities" are clear and definite. But the very definitions offered by the government conclusively show the impropriety of the inquiry. None of its definitions can be construed to include the matter assertedly under inquiry.

II

In declining to answer the question involved here petitioner used the expression "Fifth Amendment." Petitioner adopted as his own the reasons asserted by another witness, Mr. Fitzpatrick, who declined to answer by relying on "the First and Fifth Amendments." Since there is no issue as to whether petitioner could adopt the plea of another, the sole remaining question is whether the phrase "Fifth Amendment" constitutes an assertion of the Fifth Amendment privilege against self-incrimination. As we have already shown in the *Emspak* case, such a statement

is a sufficient assertion of the privilege and Judge Morris so held in the *Fitzpatrick* case. It should be added that the popular controversies on the scope of the privilege reinforce our contention on this point. Because the incriminating subject matter embraced petitioner's political affiliations, he naturally referred to the First Amendment and the Fifth Amendment. But the fact that he also referred to the First Amendment did not deprive him of the Fifth Amendment protection. There is historic close relationship between the two and a court must recognize this in construing the privilege. Nor did the assertion of innocence negate the invocation of the privilege. Here, too, it is historically established that the privilege is for the protection of the innocent, and is not, as the government would have it, a confession of guilt.

III

Even if we are wrong in our other contentions, the conviction of petitioner was barred under the applicable principles of *res judicata* and estoppel. A federal court had already held that Mr. Fitzpatrick did in fact claim the constitutional privilege. The government cannot retry the issue of whether Mr. Fitzpatrick claimed the constitutional privilege. The government's sole answer to this contention is that the principles of *res judicata* and collateral estoppel apply only as to the same parties in a criminal action. But the cases do not support this attempt to narrow the scope of the principle of *res judicata*.

IV

Although the committee was made aware of the reasons for petitioner's refusal to answer, it did not direct him to answer the question which gave rise to this proceeding.

Far from overruling his objection when it was made, the committee turned to another subject matter. On this record there is no evidence to show that the committee was not satisfied with his objections to the question.

V

Under this Court's ruling in *Dennis* v. *United States*, 339 U. S. 162, petitioner's motion for a hearing to investigate the qualifications of the grand jurors who indicted him was improperly denied. Conforming to the requirements of the *Dennis* case, petitioner in this case made a motion for a hearing to investigate the grand jurors' qualifications, accompanied by a detailed offer of proof and by affidavits showing the existence of a climate of opinion among government employees that they would jeopardize their tenure or provoke investigation by failing to indict petitioner at the government's request. Of the twenty members of the grand jury voting petitioner's indictment, ten were government employees and two others were wives of government employees. The affidavit submitted by petitioner offered to show the serious extent to which their impartiality was compromised both by specific coercive measures directed against their own independence, such as Executive Order 9835, as well as by other fear-engendering measures and practices against those who might express sympathy for or tolerance of Communists. It is difficult to see how petitioner could have done more to conform to the standards laid down by this Court in the *Dennis* case.

There was disagreement among the nine lower court judges who dealt with this issue. Three judges (Clark, Miller and Proctor) read the *Dennis* case to reject as a ground for a hearing proof of the existence of a climate of fear and intimidation, such as was shown here. We submit that these views misconstrue the *Dennis* opinion, which

rejected the assertion of such a climate not because it was in itself inadequate, but because the defendant in that case had failed to establish its existence. Four concurring judges (Prettyman, Washington, Stephens and Fahy) apparently agreed with petitioner here as to the scope and meaning of the *Dennis* decision but refused to apply it to this case on the ground that there was nothing that the jury could do but indict, since the only contested issue, in their view, was the claim of constitutional privilege, a matter of defense. But these judges made it clear that there were at least two issues in the case which would require the exercise of the judgment of a grand jury. These are the issue of whether the witness was made aware that answers were required despite his objections, and the pertinency of the question to the matter under inquiry.

In view of the solid character of petitioner's showing, it was reversible error, as Judges Bazelon and Edgerton ruled, to deny petitioner a hearing.

ARGUMENT

I

House Resolution 5 as construed and applied herein abridged petitioner's freedom of speech, press and assembly in violation of the First Amendment.

One of the questions raised by petitioner here is the contention that the resolution authorizing the committee's functioning as construed and applied herein abridged petitioner's freedom of speech, press and assembly in violation of the First Amendment to the Constitution. This question has already been fully briefed in *Emspak* v. *United*

States, No. 9, on reargument, this Term, No. 67, last Term.[5] We, therefore, do not reargue the contentions which we have previously made but rather adopt those contentions and invite the Court to consider them here as though they were fully set out (E. Br. 28-169).[6]

It is necessary here, however, to deal with the contentions of the government, which were made in the *Emspak* case but which are equally applicable to the petitioner Quinn, concerning the matter under inquiry in both cases and the relationship of that matter to the committee's basic resolution. In its brief in the *Emspak* case the government urged that the purpose of the hearing, as described by committee counsel, was the advisability of passing legislation dealing with the danger that Communists "might be gaining a foothold in national defense plants through Communist control of unions." It stated further that "H.R. 3903 [the Wood Bill] * * * deals with this problem" and was referred to in the justification for the hearing by committee counsel. According to the government, the evil to which the hearing and the legislation addressed themselves was sabotage and espionage by Communists employed in plants engaged in national defense work[7] (G. Br. p. 52).

That the Wood Bill was merely an ill-fitting disguise for the harassment of the union and the "exposure" of individuals identified with it, is evident from the following considerations:

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[5] The First Amendment issues in this case arise out of Question 4 of the Questions Presented and in the *Emspak* case out of Questions 5 and 6.

[6] We refer to our brief already filed in the *Emspak* case as "E. Br." and to the government's answering brief as "G. Br."

[7] The statement by committee counsel to which the Government referred in the *Emspak* case was not made in the hearing which gave rise to the *Emspak* contempt citation—no such statement of purpose was made in the course of that hearing—but was made at the outset of the hearing involving petitioner Quinn which took place some five months earlier (*Infiltration—Labor Unions* 541).

1. The Wood Bill does not deal in any sense with Communist control of labor unions, but deals rather with individuals employed in defense work and, as we have already shown, the Department of Justice itself told the House committee that the bill was unconstitutional (E. Br. pp. 167-169).

2. The hearings themselves do not purport to deal with the subject matter of the Wood Bill. Each of the three volumes published by the committee deals with union officers, personnel and representatives. The hearings are all entitled, *Hearings Regarding Communist Infiltration of Labor Unions*. There is not a syliable of evidence in any of the hearings connecting any of the individuals interrogated with sabotage or espionage.

3. The Wood Bill was referred to the committee on March 30, 1949 (95 C. R. 3546), but the investigation of Local 601 was commenced prior to that time in preparation for the hearing. Thus, one witness testified that a committee investigator talked to him "around February or March" of 1949 (1 *Infiltration—Labor Unions* 587), and another witness stated that he was interviewed on the "27th of February", 1949 (1 *Infiltration—Labor Unions* 591).

4. Although the investigation was initiated in February and March, 1949, the hearing was not held until August, 1949. It was held on the eve of the election of delegates to an important national convention of the Union and under circumstances which indicated that it was timed to influence the outcome of the election (1 *Infiltration—Labor Unions* 601). At least one member of the committee conceded that he had checked with an individual spearheading an attack upon the Union as to whether to proceed with the hearing (1 *Infiltration—Labor Unions* 605).

5. That the committee was concerned with attacking the Union and its leadership and intervening in the election

then pending, rather than in forestalling a threat to the security of defense work, is shown by the admission of the committee investigator that the Westinghouse plant, for which Local 601 was the collective bargaining representative, was not engaged in defense work at the time the hearing was held (1 *Infiltration—Labor Unions* 544).

6. We have already referred to Part 2 of the hearings in our brief in the *Emspak* case, where we show that the claimed legislative purpose was merely a makeweight for the committee's exposure operation (E. Br., pp. 162-164). As we have pointed out (E. Br. p. 7), members of the committee repeatedly in the course of the hearing stated that its purpose and function was "to expose communism."

7. All three hearings form a pattern of attack against the Union and vilification of its representatives. Part 3 of the hearings was held on August 29 and 30, 1950, four months after the legislative hearings had been held on the Wood Bill.[8] Two witnesses were called who were connected with the Union. Neither of them was a worker in a plant or, on the record, had any connection with defense work. The first witness, a free lance writer, charged that he had been subpoenaed five days prior to an election for bargaining representatives in connection with which he had been engaged by the Union (3 *Infiltration—Labor Unions* 3514).[9]

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[8] See *Hearings on Legislation to Outlaw Certain Un-American and Subversive Activities*, March 21 to May 4, 1950.

[9] In the brief in the *Emspak* case, we point out (E. Br. p. 98) that on June 15, 1950, shortly before the scheduled election at the Sylvania Company plant in Pennsylvania, four union collective bargaining representatives active in the campaign were subpoenaed to appear before the committee on July 10. The fact that they were subpoenaed was extensively publicized. When the witnesses went to Washington they were not called until they protested. Thereafter, on August 29, two and a half months after the strategic issuance of the subpoenas, two of them gave testimony before the committee referred to in the text.

8. Finally, it is significant that the relationship of the Union to defense production had been fully explored in a series of hearings in September and October, 1948, by a special subcommittee of the House Committee on Education and Labor. See *Investigation of Communist Infiltration of UERMWA*, 80th Cong., 2d Sess. On December 14, 1948, there was published an *Interim Report* on the Union by the House Committee on Education and Labor, under the heading, *Investigation of Communist Infiltration Into Labor Unions Which Serve the Industries of the United States.* See House of Representatives, Committee Report No. 15, 80th Cong., 2d Sess.

Even if it were true that the committee was engaged in an investigation of the threat posed by Communists working in defense plants to the security of the country, and in the collection of data to demonstrate the existence of such a threat and the need for the Wood Bill, nevertheless the convictions here cannot stand. This is so because the resolution pursuant to which the inquiry was undertaken cannot possibly be construed to authorize such an inquiry. In our brief in the *Emspak* case (E. Br., pp. 36-38) we have pointed out that such terms as "un-American" and "subversive" are incapable of definition. More important, however, is the fact that the language of the resolution cannot be construed to authorize an investigation into the need to protect defense plants from espionage or sabotage. Initially, it must be remembered that propaganda and propaganda activities form the jurisdictional subject matter of the resolution. Without the subject matter of propaganda, the resolution would have no subject matter at all. It would not merely strain but torture language to construe the resolution to authorize an investigation of espionage and sabotage.

And the government's contentions in the *Emspak* case show how far language must be stretched to justify the inquiry involved here. The government contends as follows:

struggle for religious and political liberty. The principle that no man may be forced to testify against himself emerged during the heresy probes of the early inquisitions [20] and the years of struggle in England against the Star Chamber and the High Commission.[21]

The emergence of the privilege was dictated by the need to create a bulwark against political and religious oppression. It was a milestone in man's struggle against inquisitorial tyranny and was embodied in our American Constitution as a treasured protection against political or religious despotism. When Thomas Fitzpatrick said that the First Amendment was "supplemented" by the Fifth, he was enunciating in his own words a profound historical truth. Only the naive or those wilfully bent upon destruction of constitational liberties will fail to see that the wheel has now completely turned. The privilege, which was born in a struggle for political freedom, has once again become the bulwark in a struggle for the preservation of the very freedoms for which John Lilburn and Ann Hutchison suffered in earlier days. It can hardly be dismissed as a vehicle for "abuse." History cannot be erased, as embarrassing as it may be to those who chafe under its restrictions. The great and fundamental freedoms of political and religious liberty were from their origin "supplemented," reinforced and fortified by the privilege.

Dean Erwin N. Griswold of the Harvard Law School had this to say at the last winter meeting of the Massachusetts Bar Association:

> "Where matters of a man's belief or opinions or political views are essential elements in the charge, it may

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[20] See 1 Lea, *A History of the Inquisition of the Middle Ages, passim.*

[21] See, for example, Maguire, *Attack of the Common Lawyers on the Oath Ex Officio as Administered in the Ecclesiastical Courts in England* (Essays in History and Political Theory in honor of Charles Howard McIlwain, 1936); Usher, *The Rise and Fall of the High Commission.*

1. An investigation into propaganda requires an inquiry not only into its contents but into the identity of its disseminators.

2. Communists use their positions in unions for propaganda purposes.

3. The issuance of propaganda has been combined with "solicitation for Party membership and for developing possible espionage and sabotage." Since these activities are "closely related" to propaganda they are "propaganda activities" (G. Br., p. 58).

Apart from the fact that these propositions are barren of support and that there is no evidence at all for the assertion that Communist propaganda—completely undescribed and unidentified by the government—breeds espionage and sabotage, this explanation completely disregards the plain language of the resolution. If this type of exegesis were sound, then it would be possible to use the investigatory power, no matter how limited its authorized scope, to penetrate the most remote and private relationships, affiliations and attitudes on the theory that the subject matter which is authorized is "combined with" or "related to" the matter which a congressional committee chooses to probe.[10]

In evaluating this justification, it must be borne in mind that the inquiry here was not ancillary to an inquiry into propaganda—as the government suggests—but was wholly divorced from it. The committee here did not deal with

[10] E.g., propaganda in favor of monopoly may be considered "closely related" to movements against improved schools, therefore a committee authorized to investigate the former can interrogate witnesses, subject to the sanctions of Section 192, about their membership in organizations devoted to the latter objective; propaganda in favor of states' rights is frequently "combined with" solicitation of individuals to become strike-breakers, therefore a resolution authorizing an investigation of the former justifies an inquiry into the latter activity; propaganda against low-cost housing is carried on by individuals with racial bias, therefore a resolution authorizing the former justifies inquiry into the latter.

the subject matter which the government claims concerned it as a part of, or as a means of illuminating, a larger whole, but as an end in itself.

The government's second argument is that even if the particular activities may not be said to be "propaganda activities" *per se*, they are an "aspect" of the "extent, character and objects" of propaganda activities and, therefore, are properly subject to inquiry. It is the government's argument that these words were intended to authorize inquiry into the *success* of the propaganda activities. More particularly, as we understand the government's argument, it is that the word "objects" in the resolution authorizes a study of the purposes sought to be accomplished by propaganda activities, which purposes "very well might include the use of people recruited through dissemination of propaganda who could be induced to collect secret industrial data and make themselves available for sabotage" (G. Br., p. 59).

It would of course be absurd to argue that the "objects" of Communist propaganda—whatever that may be—are espionage and sabotage. Propaganda is hardly a means of activating a campaign of espionage or sabotage. But it is scarcely less absurd to contend that since the purpose of propaganda is to recruit Communists and since individuals recruited through propaganda might be induced to engage in sabotage and espionage,[11] therefore the investigative authorization is not exceeded. Again, it is plain that through this House-that-Jack-built logic any congressional resolution can be converted into a dragnet.[12]

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[11] The government cites no evidence that those who become members of the Communist Party—whether through its propaganda or otherwise—have been induced to engage in espionage or "to make themselves available" for sabotage.

[12] *E.g.*, the object of monopoly propaganda is to recruit individuals who might well be induced to evade taxes, therefore a resolution covering the former justifies inquiry, subject to the sanctions of Section 192, into tax-evasion; those recruited into the anti-income

The government's chain of innuendo and speculation can hardly expand the language of the resolution and shift its aim to an area wholly different from that described by its language. The plain fact of the matter is that "propaganda" and "propaganada activities" are clearly differentiated from the acts which might be undertaken by those who accept and believe in such propaganda.[13] The basic evil toward which the resolution is addressed is the dissemination of ideas of a certain kind. The government now invites the Court to stand the resolution on its head by converting it into a resolution authorizing investigations into conduct in a field—labor—falling within the long established and well recognized jurisdiction of another House committee.

The government further argues (G. Br., p. 60) that the resolution has remained unchanged for many years. If the resolution does not in fact authorize the inquiry which the committee was assertedly engaging in, the fact that it has repeatedly violated its terms of reference cannot help it. The government's theory is that by multiplying invasions of basic rights, the committee somehow has reached a point of diminishing constitutional returns.

The entire reasoning of the government is another illustration of the way in which anti-communism becomes the universal justification for whatever repressive object the government may seek to promote. The government's position is flatly contrary to that adopted by this Court in

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tax movement, may well be developed into opponents of labor unions, therefore a resolution authorizing an investigation into the former objective warrants interrogation, subject to the sanction of Section 192, into anti-union activity; those who accept propaganda in favor of limiting immigration can frequently be induced to become active in movements limiting freedom of speech and press, therefore, a congressional committee authorized to investigate the former may cite for contempt a witness refusing to testify as to the latter.

[13] Contrary to the government's contention the thoroughness with which Congress described the area of propaganda so as to cover both the diffusion of propaganda as well as activities in conducting it shows that Congress was peculiarly concerned with this problem.

United States v. *Rumely*, 345 U. S. 41. In that case the Court rejected an attempt—much more modest than that involved here—to expand the term "lobbying activities" in order to bring the inquiry within the scope of the resolution. Here, as in the *Rumely* case, the Court is invited to strain the meaning of language in order to justify invasion of petitioner's rights under the First Amendment.

The government invites the Court not only to invade petitioner's First Amendment rights by expanding the scope of the resolution, but to revive the notion, condemned in *Kilbourn* v. *Thompson*, 103 U. S. 168, 181, that the power of investigation is unlimited.[14] It runs counter to the consistent rulings of this Court that individuals have "the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect to their personal and private affairs." *Sinclair* v. *United States*, 279 U. S. 263, 292. Surely, political expression and opinion enjoy as strong a claim to privacy as any other matter.

The shotgun use of the investigative process is particularly oppressive because it is implemented by Section 192 under which petitioner was indicted. This provision enables the committee to compel answers to the constitutionally improper questions which are the hallmark of the exposure system, gives the witness no standard for determining when he may legitimately resist exposure on the ground that the question is not pertinent to the committee's resolution, and empowers the committee to hold a witness in default and send him to jail for refusing to answer any question which may occur to it, however remote from its investigative mission.

If the government is right in its argument that the inquiry was authorized by the resolution, then it cannot possibly be right in its contention that the resolution is clear and definite (G. Br., pp. 78-95). In seeking to demonstrate

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[14] On the continuing vitality of this case, see *United States* v. *Rumely*, *supra*.

that the terms "propaganda" and "propaganda activities" [15] are not vague the government offers definitions of these terms (G. Br., p. 88 and footnote 28). It assures us that as it defines "propaganda", it is a "term of knowable content" (G. Br., p. 88). But it is obvious that the definition of propaganda as offered by the government could not conceivably embrace the alleged subject matter of the inquiry. It was not an inquiry into an "organized or concerted group, effort, or movement to spread a particular doctrine or system of doctrines or principles." Nor does the subject matter deal with "propaganda activities" for it manifestly does not deal with the "mechanisms and devices of subversive propagandists which are integrally related to their propaganda" (G. Br., p. 91). The investigation had nothing whatsoever to do with "the extent, processes, and purposes by which described propaganda becomes a force in American public life and which must be reckoned with by legislation" (G. Br., p. 92, footnote 31). By assuring us that "guidance to the witness" is not "in fact absent," since, "for purposes of this case, the heart of the authorization is still only subversive propaganda instigated from a foreign country" (G. Br., p. 95), the government concedes that guidance *is* absent here.

How can it be doubted that the portion of the resolution under discussion as squared by the government with acceptable standards of definiteness speaks a wholly different

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[15] We do not deal here with the terms "un-American", "subversive" and "the principle of the form of government as guaranteed by our Constitution". The vagueness of these terms is fully treated in the *Emspak* brief (E. Br. pp. 36-42). The government states (G. Br. p. 95) that the criticism of the resolution has been directed at the terms "un-American" and "subversive" rather than at the term "propaganda". The fact is that the committee has frequently been attacked because it has ignored the "propaganda" limitations of its jurisdiction (E. Br. pp. 195 ff.). It is also worth noting that the cases which have reached the courts have either involved an outright defiance of the committee before inquiry was undertaken or a refusal to answer a question pursuant to an inquiry which might be said to have involved propaganda. See cases cited by the government (G. Br. pp. 49-50).

language from the "question under inquiry"? We insist that the inquiry was not authorized by the resolution. But if it was, then the subject matter of the resolution has no meaningful boundaries.[16]

II

A directed verdict of acquittal should be entered since the petitioner properly asserted the protection of the Fifth Amendment privilege.

Petitioner was called before the subcommittee on the third day of a three-day hearing (R. 115). He had been present on the previous day when a fellow union member, Thomas J. Fitzpatrick, testified (R. 100). The hearings were conducted in an atmosphere of haste. The witnesses were constantly urged to confine their remarks to a minimum (1 *Infiltration—Labor Unions* 600, 608, 612). Petitioner was present when Mr. Fitzpatrick and Mr. Panzino were told by the chairman that the hearing must adjourn in 30 minutes. Petitioner's own examination took place in this atmosphere.

After certain preliminary questions, he was asked whether he was or ever had been a member of the Communist Party. Petitioner immediately responded as follows (R. 97):

> "I would like to make a statement along the lines that Mr. Fitzpatrick made yesterday in regard to a question of that nature."

The chairman, Mr. Wood, then questioned petitioner to ascertain whether his refusal to answer was in fact based upon the reasons given by Mr. Fitzpatrick the day before (R. 97):

> "And for those reasons do you decline to answer the question?"

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[16] And this apart from the indefiniteness of the terms "un-American" and "subversive".

Petitioner replied (R. 97):

> "I didn't say I was declining to answer the question. Before I do answer the question I should like to say that I support the position taken by Brother Fitzpatrick yesterday."

The chairman, anxious to leave no doubt that petitioner was asserting as his own the statements offered to the committee the day before by Mr. Fitzpatrick, asked petitioner (R. 97):

> "Did you hear his statement yesterday?"

to which petitioner replied:

> "Yes, I did."

Chairman Wood pressed further. He asked (R. 97):

> "Do you support it in its entirety?"

to which petitioner replied (R. 98):

> "In its entirety."

And, finally, indicating the full understanding of the committee that the witness was refusing to answer for the reasons asserted the day before by Mr. Fitzpatrick, Chairman Wood asked (R. 98):

> "Will you accept it as the expression of your views, then?"

to which petitioner replied:

> "You may. I may add I feel that I have no other choice in this matter, because the defense of the Constitution I hold sacred. I don't feel I am hiding behind the Constitution, but in this case I am standing before it, defending it, as small as I am."

After thus indicating in the clearest possible way that the committee knew the witness was refusing to answer

for the identical reasons asserted by Mr. Fitzpatrick the previous day, the chairman concluded (R. 98):

> "Having made that statement and subscribed to the sentiments expressed by the witness yesterday to whom you referred, will you now answer the question whether you are now or have ever been a member of the Communist Party?"

Thereupon, petitioner sought to amplify his statement, but was cut off by the chairman:

> "You have stated your position. Having enunciated your sentiments and your position, will you now answer the question whether you are now or ever have been a member of the Communist Party, or do you decline to answer?"

Petitioner then declined to answer the question, based upon the reasons asserted by Mr. Fitzpatrick, and the committee accepted his declination.

> "Mr. Quinn: I decline to discuss with the committee questions of that nature.
> "Mr. Wood: Proceed, Mr. Tavenner."

It is thus clear that the committee understood that petitioner had adopted as his own the reasons asserted by Mr. Fitzpatrick the day before for refusing to answer the question asked. When he attempted to develop these reasons further, the committee cut him off, fully aware that his reasons for refusing were identical with those asserted by Mr. Fitzpatrick.

The trial court convicted petitioner solely upon the theory that one may not invoke the Fifth Amendment privilege by referring to and incorporating the assertion and position of another witness. Eight of the nine Court of Appeals judges agreed that the district court was in error in so holding, and the government so conceded before the Court of Appeals.

The Court of Appeals therefore properly concluded that the question thus posed was "whether Quinn, by adopting Fitzpatrick's statement, asserted a privilege against self-incrimination. Basically, of course, that question concerns what was in Quinn's mind. But courts cannot act upon unrevealed intentions, and so the *inquiry must be whether Fitzpatrick did or did not claim the privilege.*" (Emphasis added.)

Since it was conceded below that the question asked petitioner was incriminating *per se* (R. 89) and that proper circumstances existed for the assertion of a claim of Fifth Amendment privilege (R. 129), compare *Blau* v. *U. S.*, 340 U. S. 159, the issue before the Court of Appeals was whether Fitzpatrick's statement that he refused to answer on the grounds of "the First and Fifth Amendments," as well as the "First Amendment supplemented by the Fifth Amendment," constituted an assertion of the Fifth Amendment constitutional privilege.

There was no agreement within the Court of Appeals as to whether these words clearly constitute a claim of constitutional privilege. A majority of the court concluded that the determination as to whether or not these words constitute a claim of privilege must be made by a trial court on remand of the case. Judge Prettyman in the opinion in which Chief Judge Stephens and Judge Washington joined stated that "if we were of clear opinion that Fitzpatrick, and therefore Quinn, did claim the privilege and so must be acquitted, we should dispose of the matter finally here and now. Under such circumstances we should reverse a judgment of conviction. But a majority of the court are not of that clear opinion."

The issue is thus directly presented to this Court as to whether an assertion of the "Fifth Amendment" constitutes a clear assertion of the constitutional privilege.

It is now conceded by the government that the determinative issue involves an interpretation of the significance of

the statements of Mr. Fitzpatrick. It must be recognized that Mr. Fitzpatrick, a steward of a local union, chose his own words to express himself. At the beginning of his testimony, after pointing out that the hearing could have no possible legitimate legislative purpose, he made a statement, before any question was asked, which concluded in the following manner (R. 106-107):

> "I will answer all honest questions put to me, but I have no intention of joining with the people who seek to destroy the Constitution of this country, whether witnesses or anybody else. To me, the Constitution of this country is not a scrap of paper. It is something to be maintained. I have two sons. I want them to have the same freedoms and rights that I have enjoyed. If I can't leave this world a better world, I want to leave it just as good.
>
> "The Constitution of this country provides certain protection for minorities and gives the privilege for people to speak and think as they feel they should and want to. It also gives the privilege that people can have opinions or beliefs that may be unpopular. In my opinion, it gives them the right to hold those opinions secret if they so desire. This is a protection of the First Amendment to the Constitution, supplemented by the Fifth Amendment."

The committee was thus put on notice of Mr. Fitzpatrick's intention to rely upon the First and Fifth Amendments in refusing to answer certain questions. The interrogation then commenced and in response to questions concerning membership in the Communist Party or association or affiliation with Communists, Mr. Fitzpatrick refused to answer, stating (R. 110):

> "I stand on the protection of the Constitution, the First and Fifth Amendments."

Mr. Fitzpatrick was subsequently indicted under Section 192. He was brought to trial before petitioner's trial, although the opinion in his case was not handed down by

the sitting judge until after petitioner's conviction. Mr. Fitzpatrick was tried before Judge Morris in the district court. In an extensive opinion, Judge Morris found Mr. Fitzpatrick not guilty and held that his assertion of the "First Amendment * * * supplemented by the Fifth," as well as the "First and Fifth Amendments," constituted a sufficient assertion of the protection of the Fifth Amendment. Judge Morris disposed of the prosecution's arguments in the following manner (96 F. Supp. 491, 493):

> "The Fifth Amendment to the Constitution provides, among other things, that 'No person * * * shall be compelled in any criminal case to be a witness against himself * * *.' The other provisions of that Amendment obviously have no relation to this controversy, and the provision mentioned is the one that has been construed to justify a witness in any proceeding in declining to answer any question that would tend to incriminate him, or expose him to prosecution for crime. There can be no doubt that this protection extends to a witness testifying before any judicial, congressional or administrative body of the United States Government, although, apparently, there has been misapprehension on the part of some that it does not. The use, therefore, by the defendant of the term 'Fifth Amendment' could only have reference to this provision therein, and, unless by some explicit statement that he was not claiming the protection of that provision of the Constitution, it would seem sufficient to put the committee on notice that he was asserting such claim."

Judge Morris insisted that the manner of the assertion cannot be divorced from the objective circumstances (at p. 494):

> "Where a witness, such as the defendant here, has claimed the protection of the Fifth Amendment, and that in a setting in which he has been denounced, by other witnesses testifying, as a Communist, where testimony by other witnesses, if believed, shows that he has been active in organizing and directing a Communist organization, where the statutes then in force make it a criminal offense to do such things, and where

> prosecutions have been instituted against those who are charged with doing them, it seems to me to be clear that the committee was put on ample notice that the defendant apprehended that the answers to the questions involved in this indictment would furnish information which could be used in the prosecution of him in a criminal case under existing federal statutes, and for that reason, as well as for other reasons which were not well founded, declined to answer the questions. *Blau* v. *United States*, 340 U. S. 159." [17]

Emspak v. *United States, supra,* involves, inter alia, this precise point. There too, petitioner asserted his protection under the First and Fifth Amendments, as well as the First Amendment supplemented by the Fifth Amendment. The brief of petitioner in *Emspak* fully argues the proposition that these statements represent a clear assertion of the Fifth Amendment privilege (E. Br., pp. 170-187). Since the Court consolidated *Quinn* with *Emspak* for the purposes of reargument and argument, we respectfully refer the Court to the arguments offered on this point in the *Emspak* brief, and incorporate them herein in behalf of petitioner Quinn. We will restrict ourselves here to aspects of the problem particularly relating to the *Quinn* proceeding.

In the court below, the government argued vigorously that Fitzpatrick's assertion was insufficient to constitute an effective invocation of the Fifth Amendment protection, relying upon three contentions:

1. The use of the words "Fifth Amendment" in connection with a congressional hearing does not necessarily mean the assertion of the privilege;

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[17] Frank Panzino, the third member of the Union subpoenaed together with Fitzpatrick and petitioner, used precisely the same words in asserting his Fifth Amendment protection. In *United States* v. *Panzino*, Crim. No. 1747-1950 (see Supplement I, p. 1 to *Emspak* Petition for Certiorari), Judge Goldsborough ruled that this formulation constituted an effective assertion of the Fifth Amendment privilege and, accordingly, directed a verdict of acquittal for Panzino.

2. Petitioner's joining of Fifth Amendment rights with First Amendment rights proves that petitioner was relying only upon First Amendment rights, since there is no relationship between the political rights guaranteed by the First Amendment and the privilege protected in the Fifth Amendment;
3. Petitioner's assertion of innocence indicates he was not relying upon Fifth Amendment protection, since the Fifth Amendment privilege is available only to the guilty.

We propose to deal with each of the government's contentions.

A. The use of the words "Fifth Amendment" is sufficient to invoke the protection of the privilege.

The government argues that when Mr. Fitzpatrick used the words "Fifth Amendment" as a basis for refusing to answer a question during the course of a congressional hearing, these words failed to indicate sufficiently a claim of constitutional privilege.

The words "Fifth Amendment" are household words, a part of the every-day vocabulary of all Americans. In connection with the inquisitorial conduct of congressional committees, the words "Fifth Amendment" mean only an invocation of the constitutional privilege. As Judge Morris so aptly pointed out, the only provision in the Fifth Amendment which relates to a refusal to answer, is the well-known privilege. When an individual asserts the "Fifth Amendment" before a congressional committee, no one has the slightest doubt as to which protection the witness is invoking.

The use of the words "Fifth Amendment" was clearly understood by the committee as implying an invocation of the constitutional protection. The committee did not challenge this invocation, nor did it direct petitioner or Mr. Fitzpatrick to answer the question. As a matter of fact, in the case of petitioner, the committee not only accepted the assertion, but decided to refrain from pressing further

questions of this type. If the committee had any doubt that Mr. Fitzpatrick or petitioner did in fact assert, in addition to rights under the First Amendment, their Fifth Amendment privilege, there can be no question that it would have pressed them further.

We suspect that the government will not pursue this argument too strongly before the Court, in light of the realities of the present day. To urge seriously that an assertion of the words "Fifth Amendment" is insufficient to express reliance upon the privilege would be difficult in the face of recent public statements of representatives of the government. The Attorney General of the United States not long ago gave an address which was reprinted in a leading popular magazine.[18] The caption read as follows:

> "'I refuse to testify on the ground of the Fifth Amendment.' This sentence is becoming a refrain among witnesses summoned before Government investigating bodies. And it often stops investigations in their tracks."

Thus it would seem that the Attorney General finds no difficulty in understanding that the words "Fifth Amendment" within the context of a congressional investigation mean an invocation of constitutional privilege.[19]

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[18] *U. S. News & World Report*, December 25, 1953.

[19] The use of the words "Fifth Amendment" as an invocation of privilege when asserted in the course of a congressional investigation is now universal. Even a random sampling of the most diverse sources reveals this unanimity. Thus, the *New York Times* recently reports that the Police Commissioner of the City of New York "praises Fifth Amendment as a keystone in our legal structure" *New York Times*, March 1, 1954. A university president refers to the "Fifth Amendment" in discussing the invocation of constitutional privilege. *New York Times*, March 27, 1954. Similarly, a well-known Boston attorney, in discussing the importance of the constitutional privilege in a nationally distributed, popular picture magazine, refers to the privilege consistently as the "Fifth Amendment." Joseph N. Welch, "The Lawyer's After-Thoughts," *Life*, July 26, 1954.

Should these circumstances induce the government to abandon on reargument its position that the words "Fifth Amendment" do not constitute an invocation of constitutional privilege, it would be left only with the contention that petitioner, while using the words "Fifth Amendment", affirmatively indicated in other ways that he was *disavowing* any reliance upon constitutional privilege. We turn, therefore, to a consideration of this argument.

B. Petitioner's joinder of First Amendment political rights with the Fifth Amendment privilege was well grounded in historical and present-day reality.

The government argued below that the joinder of an assertion of First Amendment rights with the Fifth Amendment indicated that Mr. Fitzpatrick and, hence, petitioner were affirmatively *disavowing* any reliance upon the constitutional privilege. This reasoning rests upon the view that in fact there is no relationship between the political rights protected by the First Amendment and the constitutional privilege contained in the Fifth Amendment. Hence, the government argues, Fitzpatrick and petitioner must have been referring to the due process clause of the Fifth Amendment (see appellee's brief in court below, at pp. 26-34).

And in the *Emspak* case (G. Br., p. 34), the government also urged that, "the privilege against self-incrimination is neither actually nor colloquially understood as a 'supplement' to the First Amendment." But it is too late to argue that the privilege against self-incrimination is not integrally related to the fundamental political liberties protected by the First Amendment.

Only recently the Attorney General himself had occasion to remind us that the constitutional privilege has its "deep roots" in the struggle for political and religious liberty among the peoples of England and America. In an address before the Law Club in Chicago in November of last year, Mr. Brownell commented:

"The privilege against self-incrimination has deep roots in early English history. The tyranny of Charles I during the years 1629 to 1640 in dealing with nonconformists, and the Star Chamber proceedings in which innocent persons were tortured into confession of crimes which they did not commit, engendered such hostility among the people that strong demands were made to end compulsory testimony as far back as 1647. By early 1650 the privilege against self-incrimination was so well established in the common law of England that it was never even thought necessary by an English Parliament to pass an act touching the matter.

"With this heritage it was not surprising that the early settlers in America fiercely resisted attempts of the governors of the royal provinces to resort to compulsory testimony for coercing confessions.

"By the time of the formation of the Union, the principle that no person could be compelled to be a witness against himself had become fixed in the common law. It was regarded then as now, as a protection to the innocent as well as to the guilty, and an essential safeguard against unfounded and tyrannical prosecution."

Mr. Brownell's Chicago speech is better history than the government's arguments in the court below. The privilege was born out of the struggle for political and religious liberty. Its history is too well known to this Court to repeat here. See *Twining* v. *New Jersey*, 211 U. S. 78; *Boyd* v. *United States*, 116 U. S. 616; *Feldman* v. *United States*, 322 U. S. 487; *Adamson* v. *California*, 332 U.S . 46, 68; *Blau* v. *United States*, 340 U. S. 159; *Hoffman* v. *United States*, 341 U. S. 479. See 8 Wigmore, *Evidence* (3d ed.) § 2250; Boudin, *The Constitutional Privilege in Operation*, 12 Lawyers Guild Review 128 (1952).

The government's argument that the freedoms embodied in the First Amendment are not "supplemented" by the protections of the Fifth Amendment privilege disregards historical fact and present-day reality. All historians agree that the legal and spiritual sources of the constitutional privilege are to be found in the centuries-long

> be most difficult to get evidence from sources other than the suspected or accused person himself. Hence, the significance of the privilege over the years has perhaps been greatest in connection with resistance to prosecution for such offenses as heresy or political crimes. In these areas the privilege against self-incrimination has been a protection for freedom of thought, and a hindrance to any government which might wish to prosecute for thoughts and opinions alone."

Today the search for political heresy has reached heights hitherto unparalleled in American history. Every section of the government machinery, legislative, executive and judicial, has been utilized as the tempo of the hunt increased. It is precisely at such a moment that the history of the constitutional privilege reasserts itself with renewed vigor. The privilege which was born as a "supplement" to political and religious liberty, once again has become in the most profound sense a "supplement" to the fundamental freedoms of the First Amendment.

C. Petitioner's assertion of innocence does not negate an invocation of the Fifth Amendment privilege.

In the courts below the government insisted that petitioner's continued assertion of innocence negated the assertion of the privilege. The government argued that the privilege is available only to the guilty. Thus, the government urged the following proposition upon the court below:

> "It is true that certain expressions are to be found in the authorities that the privilege against self-incrimination protects the innocent as well as the guilty. There can be no truth in this proposition except in the sense of a long-range philosophical view. In this sense, it is true of every oppression of the guilty that it inevitably will seep into the rights of the innocent. *But in the sense of the application of the privilege, its immediate protection is for the guilty only, because only the guilty can be incriminated*" (Appellee's brief in court below, p. 22). (Emphasis supplied.)

The notion that the Fifth Amendment privilege is available only to the guilty has become the main instrument of those who would eliminate this constitutional provision from the Bill of Rights. It is a false and harmful theory and, as this Court has pointed out, has no relation to historical reality or constitutional principle. See *Twining* v. *New Jersey*, 211 U. S. 78.[22] When this Court stated that the constitutional privilege "was generally regarded then, as now, as a privilege of great value, a protection to the innocent, though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions", *Twining* v. *New Jersey, supra*, at 91, it was not expressing a "long-range philosophical view" (see appellee's brief in the court below at p. 22). It was affirmatively stating a basic constitutional fact.[23]

It must be recognized that the proposition advanced by the government in the court below has already become the rallying cry of many who would destroy the privilege by

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[22] There may be some division of opinion in the Department of Justice as to the validity of the proposition advanced by the government in the court below equating an invocation of privilege with a confession of guilt. For example, Mr. Brownell recently seems to have reaffirmed the basic principle of *Twining* in his address before the Chicago Law Club on the privilege. Mr. Brownell, echoing the words of the *Twining* decision, said, "By the time of the formation of the Union, the principle that no person could be compelled to be a witness against himself had become fixed in the common law. It was regarded then as now, as a protection to the innocent as well as to the guilty, and an essential safeguard against unfounded and tyrannical prosecution."

[23] Of course members of the bar should be the last to forget the basic meaning of the privilege. As has recently been pointed out:

> "Lawyers, of all men, should know and understand the origin and reason for the constitutional privilege, which was to protect innocent men against the inquisitorial and manifestly unjust methods of interrogating witnesses, the temptation of prosecutors to press, browbeat and entrap them into fatal contradictions, and against the zeal of the prosecutor and public clamor for the punishment of crime" (128 *New York Law Journal* 1374 (December 4, 1952), Letter of Harold H. Corbin, Esq.).

creating the impression in the public mind that an invocation of privilege is tantamount to a confession of guilt.[24]

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[24] In the hearings of the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations Senator McCarthy has repeatedly interpreted use of the Fifth Amendment as indicating that there was "something to hide." Thus in response to the statement of one witness that it was his "understanding that the Fifth Amendment of the Constitution implies no guilt as such, and it is protecting the innocent as well as the guilty," Senator McCarthy declared:

> "No. * * * Let us have it very clear when you say, 'I refuse to answer because if I were to tell the truth it would incriminate me,' you are giving the committee and the country some information. Of course, it cannot be used against you in a criminal trial." (*Army Signal Corps—Subversion and Espionage,* Part 3, pp. 118-119.)

Again, to another witness, he stated:

> "The best evidence is your standing up here and saying that 'If I tell you the truth, I will go to jail'. You cannot get better evidence." (*Ibid.*, Part 1, p. 42.)

Senator McCarthy advised still another witness:

> "You, of course, understand that, so that when you make that answer, 'I refuse to answer on the grounds of self-incrimination,' you are telling the country, in effect, that you are a traitor, that you are indulging at this time in treason against your country; that you are an espionage agent. You understand that." (*Ibid.*, Part 4, p. 152.)

He further explained:

> "It [the Fifth Amendment] provides that a criminal need not convict himself. And an innocent man does not need the Fifth Amendment. * * * If you are not a Communist, you would not incriminate yourself by saying no. If you are not a traitor, if you are not a spy for the Communists, you could not incriminate yourself by saying no." (*Ibid.*, p. 153.)

On another occasion the Senator declared:

> "* * * may I say that the best evidence that you are a Communist spy is the fact that you tell us that if you were to tell the truth, as to whether or not you were, it would incriminate you." (*Ibid.*, p. 161.)

Senator McCarthy finally reduced his interpretation of the use of the Fifth Amendment to three simple words:

> "Fifth Amendment Communist." (For applications of this phrase see for example the hearing of Brig. Gen. Ralph W.

The Dean of Harvard Law School only recently bespoke the urgency of rescuing the essence of the privilege from those who would make its use a form of public confession. In an address to the Massachusetts Bar Association he had the occasion to say:

> "Isn't the claim of the privilege the clearest sort of proof that the person who claims it is guilty of a crime? This has been asserted by high authority, but I do not believe it is true.

Zwicker, *Communist Infiltration in the Army*, Part 3, pp. 146, 147.)

Only recently Joseph N. Welch of Boston has responded to this disfigurement of the privilege:

> "There was one other matter that kept bothering me. It was certainly not an issue. It was really just a matter of phraseology. I doubt if many listeners even noticed it and perhaps my concern with it is just another proof that I am somewhat old-fashioned. I refer to the frequent use on the McCarthy side of the table, over and over again, of the words, 'Fifth Amendment Communist.' Did my ears deceive me, or is there in these words, used as they are, a connotation of opprobrium attaching to a provision of our Constitution? Are some of us beginning to wish, or being led to wish, that we had no Fifth Amendment?
>
> "Every schoolboy knows, but perhaps some of us older folk have forgotten, that the Fifth Amendment is part of the Bill of Rights, which our founding fathers added to the Constitution as insurance against a government turned arbitrary or tyrannical. It is quite an eloquent document, this Bill of Rights, and it would do us no harm to re-study its brave and brilliant words from time to time.
>
> "The Fifth Amendment is particularly noteworthy, for in just 108 words it provides that the government cannot seize private property for public use without paying for it; that no person can, in the most famous of its phrases, 'be deprived of life, liberty, or property without due process of law'; that no person can be put to trial on any major criminal charge by the whim of some vengeful public official but only by the considered action of a grand jury of his fellow citizens; and that no defendant shall be subjected to double jeopardy or forced to testify against himself.
>
> "It is this last provision, of course, to which Senator McCarthy and his staff refer. Yet any lawyer will tell you that the Fifth Amendment was never intended to serve as a con-

"Apart from its expression of our view of civilized governmental conduct, another purpose of the Fifth Amendment is to protect the innocent. But how can a man claim the privilege if he is innocent? How can a man fear he will incriminate himself if he knows he has committed no crime? Judge Magruder of our own First Circuit Court of Appeals has recently given some illustrations of this in his illuminating opinion in the *Maffie* case, decided last month.

"There is, for example, the case of the man who has killed another in self defense, or by accident, without design or fault. He has committed no crime, yet his answer to the question whether he killed the man may well incriminate him. At the very least it will in effect shift the burden of proof to him so that he will have to prove his own innocence. Indeed, the privilege against self-incrimination may well be thought of as

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fession of guilt. It was added to the Constitution to protect the innocent. It was written, history shows, for a specific and rather unpleasant reason. Our founding fathers were familiar enough with the history of the Middle Ages to know that 'justice' in that time took some peculiar forms. They knew that the formal trial of a citizen often began by placing him to torture, with someone standing by to take down that era's equivalent of a stenographic transcript of the 'confession' he made in his agony. The transcript was then piously and lugubriously produced in court as proof of the poor devil's guilt.

"The framers of the Bill of Rights were determined that this should never happen in this fair country of ours and in this spirit, which I can hardly find blameworthy, they wrote the Fifth Amendment. Now, to be sure, the Fifth Amendment has been resorted to in the intervening years by many rascals, by many guilty men and doubtless there are persons invoking it today who will one day be found guilty. But no matter who invokes the amendment, it stands in our Constitution as one of the guardians of our liberties. It is for all men to use. Guilt will have to be proved in other ways, not in a way reminiscent of the medieval dungeons.

"It would be a pity if the net effect of these long and laborious hearings, the confusion and the travail were merely to undermine our nation's faith in the document that made the nation possible. If the phrase 'Fifth Amendment Communist' has in any way eroded your faith in the Bill of Rights, read it once again, I pray you." (Joseph N. Welch, "The Lawyer's Afterthoughts," *Life*, July 26, 1954.)

a companion of our established rule that a man is innocent until he has been proved guilty."[25]

The erroneous and harmful proposition advanced by the government that the privilege is only for the guilty should be rejected in order to do justice to petitioner. It should also be rejected in order to preserve for the entire people a valuable constitutional right.

III

The conviction of the petitioner was barred under the principles of *res judicata* and estoppel.

Since the conviction of the petitioner was barred under applicable principles of *res judicata* and estoppel the Court of Appeals should have reversed and directed a judgment of acquittal rather than remanding for a new trial.

In rejecting the contention of the lower court that an individual may not adopt as his own the claim of privilege of another witness, the Court of Appeals held for the first time in the proceeding that the "inquiry must be whether Fitzpatrick did or did not claim the privilege."

A federal court had, however, already held that Mr. Fitzpatrick did in fact claim the constitutional privilege. Judge Morris in the district court, hearing testimony prior to the date of petitioner's trial, held specifically and directly that the witness Fitzpatrick did in fact claim the Fifth Amendment privilege. *United States* v. *Fitzpatrick, supra.* Under the governing principles of *res judicata* and estoppel the government may not retry the issue of whether Fitzpatrick claimed the constitutional privilege. The Court of Appeals should have directed the district court to enter a judgment of acquittal upon remand.

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[25] See in this connection *Maffie* v. *United States*, 209 F. 2d 225 (C. A. 1), referred to by Dean Griswold.

It has long been held by this Court that the principles of *res judicata* and estoppel are "as applicable to the decisions of criminal courts as to those of civil jurisdiction." *Frank* v. *Mangum*, 237 U. S. 309, 334. The Fifth Amendment provision against double jeopardy was not intended to supplant the fundamental principle of *res judicata* in criminal cases. *Collins* v. *Loisel*, 262 U. S. 426, 430. As this Court pointed out in *United States* v. *Oppenheimer*, 242 U. S. 85, 87, "* * * the proposition of the government is that the doctrine of *res judicata* does not exist for criminal cases except in the modified form of the Fifth Amendment, that a person shall not be subject for the same offense to be twice put in jeopardy of life or limb * * *. It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." [26] See also *Res Judicata As a Plea In Criminal Prosecution*, 25 Virginia L. R. 839, and *The Doctrine of Res Judicata as Applied to the Trial of Criminal Cases*, 10 Washington L. R. 198.

Under the basic principles of estoppel by judgment the government is barred from retrying the issue of whether Mr. Fitzpatrick asserted the privilege. The Court of Appeals has held that petitioner's criminal liability rests solely upon an inquiry into whether Mr. Fitzpatrick claimed the privilege. Where the liability of a person rests upon the act of another a valid judgment on the merits in favor of the latter binds a plaintiff as against the former. *Re-*

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[26] *Freeman on Judgments* (5th Ed.) § 648:

> "There is no reason why a final judgment in a criminal prosecution or proceeding should not, under proper circumstances, be given conclusive effect as an estoppel or bar. The same policy which dictates the rule in civil cases requires it in criminal cases.
>
> "* * * The principles applicable to judgments in criminal cases are, in general, identical, so far as the question of estoppel is involved, with the principles recognized in civil cases. * * *"

statement of Judgments, § 99. This rule of estoppel reflects the fundamental policy that "the person against whom the rule works adversely has had his day in court." *Restatement of Judgments*, § 99, comment (a).

Moreover, where the liability of an individual rests upon a characterization of an act of another, a judgment on those facts in favor of the primary actor is a bar to litigation even though the individual asserting the bar was not a party to the original action. *Freeman on Judgments*, § 451. This Court has enunciated this principle in *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U. S. 111, 127:

> "An apparent exception to this rule of mutuality has been held to exist where the liability of the defendant is altogether dependent upon the culpability of one exonerated in a prior suit, upon the same facts when sued by the same plaintiff. See Portland Gold Mining Co. v. Stratton's Independence, 158 Fed. 63, where the cases are collected."

See also, *New Orleans & N. E. R. Co.* v. *Jopes*, 142 U. S. 18, 24, 27.

Under these principles the government is estopped from retrying the issue of whether Mr. Fitzpatrick claimed the constitutional privilege. The Court of Appeals has now held that the question of petitioner's criminal liability rests upon a determination of whether in fact Mr. Fitzpatrick claimed his privilege. The government has had its day in court on that issue and it has been decided adversely to the government. That issue may not now be retried under the applicable decisions of this Court and the general principles of estoppel. The Court of Appeals should have directed a judgment of acquittal upon the remand.

The government has advanced only one answer to this entire argument, namely that:

> "The simple answer to this is that *res judicata* and collateral estoppel apply only as between the same par-

> ties in a criminal action. *Frank* v. *Mangum*, 237 U. S. 309. See also: *Commissioner* v. *Sunnen*, 333 U. S. 591, 597-598." (Brief of the United States in Opposition to Petition for Certiorari, at p. 14.)[27]

This statement of the government that the principles of *res judicata* and estoppel apply only as between the same parties in a criminal action is plainly erroneous. This Court has never made any such statement. Quite to the contrary this Court has emphasized that the principles of *res judicata* are as "applicable to the decisions of criminal courts as to those of civil jurisdiction." *Frank* v. *Mangum*, *supra*, at p. 334. The Court has never said, nor in reason could it say, that only *certain* principles of *res judicata* apply to criminal proceedings.

It is apparent from the decided cases that *all* the principles of *res judicata* are equally applicable to civil or criminal proceedings. See *Frank* v. *Mangum*, *Collins* v. *Loisel*, *United States* v. *Oppenheimer*, *supra*. Hence it is clear that the rule of *Bigelow* applies equally to criminal or civil proceedings. Under the rule of *Bigelow* as we have demonstrated above, the government is barred from retrying the issue of whether Mr. Fitzpatrick claimed his privilege, since petitioner's liability is wholly dependent upon a determination of the "culpability of one exonerated in a prior suit upon the same facts." A judgment of acquittal should have been entered by the lower court.

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[27] The government intimates that the principle of *res judicata* may not apply for the additional reason that "there remains unsolved the issue as to what part of Fitzpatrick's statement petitioner adopted." Brief of the United States in Opposition to Petition for Certiorari, at p. 14. The simple answer to this argument is an examination of the record of the committee hearing. The chairman specifically asked petitioner in respect to his adoption of Mr. Fitzpatrick's statement, "Do you support it in its entirety?", to which petitioner replied, "in its entirety" (R. 97-98).

IV

A directed verdict of acquittal should have been entered since the petitioner was never specifically directed by the committee to answer the question.

While the lower court held that it was not necessary for the committee specifically to direct a witness to answer, it ruled that the witness must be made aware that the committee rejected his objection to the questions and desired answers despite the grounds he had advanced for refusing (R. 171-172). This point is discussed fully in the brief in *Emspak* v. *United States* and we incorporate the arguments and references made therein.

The record of petitioner's hearing shows beyond any doubt that the committee fully accepted his stated objections and did not make him "aware that answers were required despite his objections" (R. 171-172). The record reveals that the committee was solely interested in discovering whether petitioner adopted Mr. Fitzpatrick's statement in its entirety. Once the committee was satisfied that petitioner was in fact refusing to answer for the same grounds advanced by Mr. Fitzpatrick the day before, it abruptly terminated any further inquiry along these lines. Thus the chairman of the committee, Mr. Wood, said (R. 98):

> "You have stated your position. Having enunciated your sentiments and position, will you now answer the question whether you are now or ever have been a member of the Communist Party or do you decline to answer?"

to which petitioner replied:

> "I decline to discuss with the committee questions of that nature."

The chairman did not then overrule this objection. He did not comment on the objection. He in no way indicated

to petitioner that he or the committee were not satisfied with the objection. Quite to the contrary, he then turned to committee counsel and stated: "Proceed, Mr. Tavenner." Committee counsel then expressed the committee's full acceptance of the objections (R. 98):

> "I believe in the light of that answer it is not necessary to ask you any further questions relating to those matters, so I will ask you this: Do you know Mr. James J. Matles?"

to which petitioner replied: "Yes."

We do not understand how it is possible to read into this record any indication to petitioner on the part of the committee that they were demanding answers despite his asserted grounds for refusal. In the light of the statements of the chairman and committee counsel it is perfectly clear that regardless of what they may have felt privately about the validity of petitioner's objections, they had concluded not to press the point. So far as the petitioner was concerned, there was no indication whatever that they were not perfectly satisfied with his objections to the question. As the lower court has interpreted the statute, it is no refusal to answer absent an indication to the witness by the committee that it desired answers to its questions despite the grounds advanced for refusing. On this record consequently there was no violation of the statute and a directed verdict of acquittal should have been entered.

V

The motion for a hearing to investigate the qualifications of the grand jury was improperly denied in the face of a detailed offer of proof and affidavits showing the existence of a climate of opinion among government employees that they would jeopardize their tenure or provoke investigation by failing to indict the petitioner at the government's request.

This Court has held in *Dennis* v. *United States*, 339 U. S. 162, that government employees serving as jurors will be barred as a group for bias when circumstances are brought to the court's attention demonstrating that government employees would not be suitable jurors in a particular case.

In *Dennis*, petitioner urged that government employees should have been barred from the jury under the special circumstances of his case. The majority of this Court held that such bias must appear from the record and could not be the subject of judicial notice. The concurring opinion of Justice Reed, without which there was no majority, sharply emphasizes the holding of *Dennis* (at 172-173):

> "Mr. Justice Reed concurs in the opinion and judgment of the Court. He reads the Court's decision to mean that government employees may be barred for implied bias when circumstances are properly brought to the court's attention which convince the court that government employees would not be suitable jurors in a particular case. Absent such a showing, however, government employees may not be barred from jury service merely because they are government employees."

The *Dennis* majority went still further and indicated the precise type of evidence which would ground an exclusion of government employees from jury duty (at 168):

> "As far as it appears, the court was willing to consider any evidence which would indicate that investigatory agencies of the government had recognized in the past or would take cognizance in the future of a vote of acquittal, but no such proof was made. Nor was there evidence with respect to the existence of a climate of opinion among government employees that they would jeopardize their tenure or provoke investigation by such a verdict."

In the instant proceeding petitioner offered to prove the precise factual conditions laid down in *Dennis* as a prerequisite for barring government employees as jurors—namely the existence of a climate of opinion among government employees that they would jeopardize their tenure or provoke investigation by failing to indict the defendant at the government's request.

There were twenty members of the grand jury which voted petitioner's indictment. Counsel for the government conceded that ten of these grand jurors were government employees and two others were wives of government employees (R. 161). Petitioner moved under Rule 12 of the Federal Rules of Criminal Procedure for a hearing on his motion to dismiss the indictment as void in that there were not twelve duly qualified and impartial jurors. *Crowley* v. *United States*, 194 U. S. 461; *United States ex rel. McCann* v. *Thompson*, 144 F. 2d 604 (C. A. 2), cert. denied 323 U. S. 790; 18 U. S. C. A. 554a; Rule 6(a) (2), Federal Rules of Criminal Procedure.

Petitioner submitted two affidavits (R. 15, 34) in support of his factual allegations and subsequently incorporated these affidavits in an extended offer of proof at the argument on the motion for a hearing under Rule 12 (R. 160). The district court denied the request for a hearing, struck the affidavits and rejected petitioner's offer of proof in support of the motion (R. 65).

In the affidavits submitted and in the offer of proof, petitioner offered to prove, *inter alia*, the following allegations of fact in support of the motion to dismiss the indictment:

1. Ten of the twenty grand jurors voting on the indictment were government employees (R. 34). Two other jurors were wives of government employees (R. 35).

2. Government employees at the time of the indictment and for a number of years previous were the subject of an active campaign to determine whether they were in any way sympathetic with or tolerant to Communists or any person associated with Communists or any organization charged to be a "Communist front" (R. 35).

3. At the time of the indictment, congressional leaders, congressional committees and heads of federal executive agencies were engaged in efforts to "purge" from government employment any person found to be so stigmatized (R. 36).

4. Under the President's Loyalty Order, Executive Order 9835, government employees were subject to the most intensive and searching investigation of their conduct, beliefs and associations involving in the remotest manner sympathy with persons or organizations charged to be Communistic (R. 37).

5. At the very time that the grand jury in this proceeding was considering whether to return indictments, the United States Civil Service Commission reported publicly that 280 government employees had already been dismissed as "security risks" under the loyalty program; that 13,202 employees had been the subject of a full and complete investigation by the Federal Bureau of Investigation; that 1593 employees had resigned while under FBI investigation and that 1171 employees had left their government jobs before the loyalty investigation had been completed (R. 40).

6. The actual conduct of the loyalty review boards was such as to create the distinct impression among government employees that the only way a govern-

ment employee could safeguard his livelihood was to express active hostility to any idea, person or organization which might possibly be attacked as Communist (R. 40-41).

7. Numerous articles in the public press and reports over the radio concerning the intensive nature of the loyalty investigation engendered fear and apprehension among government employees as to the retention of their jobs as a means of livelihood (R. 39).

8. The transcript of the hearing before the House Committee on Un-American Activities was before the grand jury during its deliberations. This transcript revealed to the grand jurors that the defendant was charged with contempt of the House Committee on Un-American Activities and was being investigated by the committee for alleged Communist activities (R. 16).

9. The House Committee on Un-American Activities had been extremely active in this investigation of alleged disloyalty among government employees and had publicly announced that its files and reports were used by the investigating agencies of the federal government to determine the loyalty of government employees (R. 36).

10. At the time of the grand jury hearings and a number of years prior to that, a number of congressional committees in addition to the Un-American Activities Committee, had conducted intensive investigations into the loyalty of government employees (R. 41).

11. There had been attempts at public intimidation of jurors and federal judges in proceedings involving alleged Communist activities (R. 37).

a) A resolution was introduced in Congress demanding the investigation of the presiding judge in the first Hiss trial, impugning his loyalty solely be-

cause he had attempted to exercise the functions of his office to the best of his ability (R. 37).

b) One of the jurors who refused to vote for the conviction of Hiss was required to appeal to law enforcement agencies for protection against individuals harassing him because of his vote (R. 37).

c) When the Court of Appeals for the Ninth Circuit granted bail to Harry Bridges, accused of Communist affiliation, a resolution was introduced in the Senate demanding investigation of these jurists (R. 37).

12. The Federal Bureau of Investigation had investigated and checked every federal grand juror who was a government employee. The employment of each such individual was conditioned upon a favorable report from that agency which is a subdivision of the prosecutor's office (R. 43).

13. The Department of Justice announced that the Federal Bureau of Investigation was engaged in the greatest man-hunt among federal Civil Service employees that this country has ever engaged in (R. 42).

14. Information concerning the loyalty of grand jurors who were federal employees was available to the Attorney General's office prior to the time the grand jury was sworn in (R. 43).

15. Each and every grand juror who was a government employee remained under the surveillance of the FBI during his entire employment by the government (R. 43).

16. The director of the Federal Bureau of Investigation stated publicly that whenever a federal employee was accused of "Communist affiliations", whether or not such accusations were based on fact, a full scale investigation was instituted by the Bureau (R. 42).

In addition to these specific allegations of fact set forth in the affidavits and incorporated in the offer of proof, petitioner attached a number of exhibits to the affidavits containing statements by various experts, all probative of the following propositions of fact which petitioner was prepared to prove:

1. Because of the general atmosphere of intimidation and the fear that they would be called to account for any activity or expression of opinion indicating the slightest sympathy with any person charged with being a Communist, government employees had a "low morale" (R. 45, 46).

2. Government employees as a result of this atmosphere were frightened, "upset and scared" (R. 46, 47).

3. Government employees were aware of the type of investigation made in loyalty cases and therefore assumed that any type of activity or expression of opinion which expressed sympathy for ideas or individuals charged with being Communists would provide grounds for suspicion of their own "loyalty" (R. 49, 50, 51).

4. The loyalty program was and had been used unjustly and indiscriminately as a means of depriving government employees of their jobs (R. 54).

5. The Federal Bureau of Investigation investigated every detail of the private lives, opinions, activities, reading habits and thoughts of an individual involved in a government employee loyalty check. To this end, the FBI used every technique, including wiretapping and anonymous informants (R. 56, 57).

6. As a result of these facts, prominent observers of the Washington scene concluded that "suspicion and uncertainty" beclouds government service (R. 58, 59).

These allegations and propositions of fact describe in great detail the climate of opinion at the time of the indictment among government employees in Washington to the effect that "they would jeopardize their tenure or provoke investigation," see *Dennis* v. *United States, supra,* by any conduct on their part which might be interpreted as favorable to petitioner. Under the ruling of *Dennis,* upon the proof of these allegations of fact the indictment would have to be dismissed.

A majority of the Court of Appeals sitting *en banc* upheld the denial of a hearing, although no majority could be found to support any one rationale for this refusal.[28]

Judges Clark, Miller and Proctor upheld the denial of a hearing by reading *Dennis* as foreclosing in its entirety any showing such as was set forth in petitioner's affidavits and exhibits (203 F. 2d at 56). Judges Prettyman, Stephens, Washington and Fahy accepted petitioner's reading of the import of this Court's decision in *Dennis,* but held that the decision there was not applicable to the particular fact situation in the present proceeding (at 58-60). Judges Bazelon and Edgerton dissented from the denial of a hearing on petitioner's affidavits and offer of proof (at 61).

Judges Clark, Miller and Proctor in upholding the denial of the hearing interpreted the ruling of this Court in *Dennis* in the following manner (at 56):

> "The affidavits which he [the petitioner] submitted to support his motion for hearing had as their sole basis the argument that government employees on the grand jury were incapable of reaching an unbiased decision, and they did no more than assert existence of a 'miasma of fear' so clearly rejected in the Dennis case. Without more, there was no ground upon which an order

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[28] The opinions of the Court of Appeals on this point are to be found both in *Emspak* v. *United States,* 203 F. 2d 54, as well as in the opinion in the instant case. The grand jury issue here is identical to that raised by petitioner in *Emspak* and the court below treated it as such.

for hearing might be founded, and there was no error in the denial thereof."

It is impossible to reconcile the holding of these three judges with either the majority or the concurring opinion in *Dennis*. In that case the petitioner moved for a transfer to another district on the ground that prejudice against him in the District of Columbia would prevent a fair trial. He then challenged for cause all government employees called to serve as petty jurors. A brief affidavit which was presented only in support of the transfer motion, alleged without further factual support that (1) the effect of the Executive Loyalty Order would prohibit a fair trial, (2) that the functioning of the House Committee on Un-American Activities might prevent a not guilty verdict, and (3) that false rumors in the press had discredited the defendant, prejudicing his right to a fair trial. No hearing was requested or offer of proof made in connection with the transfer motion.

The majority opinion in *Dennis* ruled that the Court will not take judicial notice of an asserted "miasma of fear" intimidating government employees from exercising free and impartial judgment as grand jurors in cases involving political offenses. The crux of the majority opinion in *Dennis* is the conclusion that the petitioner there had failed to establish the existence of such a climate or atmosphere. This conclusion is underlined by the majority's approving reference to "any evidence which would indicate that investigatory agencies of the government had recognized in the past or would take cognizance in the future of a vote of acquittal * * *" or evidence "with respect to the existence of a climate of opinion among government employees that they would jeopardize their tenure or provoke investigation by such a verdict." *Dennis* v. *United States*, *supra*, at 168. The majority of the Court thus did not reject as a standard the existence of a "miasma of fear" but merely declined a request "that judicial notice be taken of an aura of surveillance and intimidation which is said to exist in

the District because of Executive Order 9835, outstanding at the time of the trial." *Dennis* v. *United States, supra,* at 169.

The concurring opinion of Mr. Justice Reed emphasizes the import of the majority opinion. Mr. Justice Reed read the majority to mean "that government employees may be barred for implied bias when circumstances are properly brought to the court's attention which convince the court the government employees would not be suitable jurors in a particular case. Absent such a showing, however, government employees may not be barred from jury service merely because they are government employees." *Dennis* v. *United States, supra,* at 172, 173.

In light of the *Dennis* opinions, it is impossible to hold that this Court has foreclosed any inquiry into an atmosphere of fear resulting in partiality and intimidation on the part of federal employees acting as jurors in the District of Columbia. Quite to the contrary, six of the seven justices who participated in the *Dennis* case were agreed that such an opportunity must be available to a defendant in a criminal proceeding.[29] The only disagreement between the dissenting justices and the majority and concurring justices was as to whether the record then before the Court was sufficient to permit a finding that such an atmosphere of fear among government employees did in fact exist.

That problem is not present here. Petitioner, through his offer of proof and affidavits, has set forth in great detail allegations of fact which would, in the words of the *Dennis* majority, "indicate that investigatory agencies of the government had recognized in the past or would take cognizance in the future of a vote of acquittal" as well as a vast amount of evidence tending to show, again in the

[29] The concurring opinion of Justice Jackson in *Dennis* is based upon the view that the decision of the Court in *Frazier* v. *United States*, 335 U. S. 497 should be reversed.

words of the *Dennis* majority, "a climate of opinion among government employees that they would jeopardize their tenure or provoke investigation by such a verdict." Petitioner, here, has taken the very steps which the *Dennis* majority authorizes. Under the *Dennis* decision it was clear error to deny petitioner an opportunity to make his proof in a proper hearing.

The concurring Judges, Prettyman, Washington, Chief Judge Stephens and Fahy, did not read the *Dennis* case as did Judges Clark, Miller and Proctor. These members of the Court of Appeals assumed for the purposes of this case that the concurring opinion of Mr. Justice Reed in *Dennis* is "an accurate summation of the opinion of the Court" and summarized the rule of *Dennis* in the following manner (203 F. 2d at 58): "The question before us is whether circumstances were brought to the trial court's attention which demonstrated that government employees would not be suitable grand jurors in the particular case."

The concurring judges did not hold that petitioner's offer of proof was insufficient in law. To the contrary, they indicated that such an offer might have been sufficient in "other cases and other circumstances" (at 59). These members of the lower court based their affirmance on the assumption that in *this particular case* there was no area of discretion for the grand jury. Under their view the grand jury could do nothing but indict since it was not called upon to evaluate the probabilities of a "doubtful *prima facie* case or of a charge in the realm of opinion or controversy" (at 60) and since the only contested issue assertedly before the grand jury was the claim of constitutional privilege which was a matter of "defense of justification" (at 60).

But this conclusion of Judges Prettyman, Washington and Chief Judge Stephens, joined in in this respect by Judge Fahy in *Emspak*, is in conflict with their opinions in this case. Judges Prettyman, Washington and Chief Judge Stephens held that "the deliberate and intential

character of the refusal is an element of the offense, to be determined from all the circumstances by the trier of the facts" and pointed out in amplification that "to constitute an offense, refusal to answer must be intentional" and that "it must appear that [the defendant] was aware of the intention of his inquirer that answers were required despite his objections" (R. 171-172). We assume, for the purpose of argument, that the discussion of Judges Prettyman, Washington and Chief Judge Stephens represents the opinion of the lower court on the question of "direction." To hold that a *prima facie* case of violation of the statute is present, a grand jury must therefore consider whether it appears from the evidence that the witness "was aware of the intention of his inquirer that answers were required despite his objections." Thus the lower court held that this is not a matter of "defense of justification," but rather *"an element of the offense."* Hence this is an issue which the grand jury would have had to consider in deciding whether there was a *"prima facie"* case of violation of statute.

It seems clear from the very opinion of these judges that there *was* in fact an area of discretion for the grand jury. The grand jury might have concluded on the basis of the record that the petitioner was not "aware of the intention of his inquirer that answers were required despite his objections." That this was a reasonably possible conclusion for an impartial trier to arrive at is evidenced by the remand in this case which instructs the trial court to consider this very point. See also *Keeney* v. *United States*, decided by the court below, August 26, 1954 (opinion of Judge Prettyman).

A subsequent decision of the Court of Appeals, *Bowers* v. *United States*, 202 F. 2d 447, further emphasizes the inherent conflict in the opinion of the concurring judges. In *Bowers*, the Court of Appeals held that pertinency is a material ingredient of an offense under the contempt statute. If pertinency is a material ingredient of the

offense, this, too, must be shown to the grand jury in demonstrating the existence of a *prima facie* case. At a minimum the grand jury which considered petitioner's indictment had before it two issues involving the exercise of discretion: (1) the presence or absence of an awareness of the intention of the inquirer that answers were required despite objections, and (2) the presence or absence of the ingredient of pertinency.

This discretion of the grand jury in a situation impregnated with the issue of "communism" and involving a congressional investigation into "Communist infiltration" in labor unions, was exercised in a manner detrimental to the right of petitioner to an impartial determination by the grand jury. This the petitioner offered to and was ready to prove at an appropriate hearing which he requested.

The government argued below that the refusal to grant a hearing on petitioner's motion directed to the qualifications of the grand jury was within the area of discretion of the trial judge. This is not the law. A trial judge has, of course, certain latitude in disposing of objections raised to an indicting grand jury. Where the grounds advanced in support of a motion to quash an indictment are clearly insufficient in law, there is no requirement that a hearing be granted on such a motion. *United States* v. *Rintelen*, 235 Fed. 787 (D. C. N. Y.). However, a refusal to hear evidence offered in support of legally sufficient allegations challenging a grand or petty jury is always reversible error. *Carter* v. *Texas*, 177 U. S. 442; *Smith* v. *Mississippi*, 162 U. S. 592; *Tarrance* v. *Florida*, 188 U. S. 519; *Glasser* v. *United States*, 315 U. S. 60, 87; *Morford* v. *United States*, 339 U. S. 258. Similarly, the refusal of an offer of proof made in open court in support of a motion to dismiss an indictment for improper constitution of a grand or petty jury is likewise reversible error. *Carter* v. *Texas*, *supra*; *Brownfield* v. *South Carolina*, 189 U. S. 426.

Under the rule of *Dennis*, petitioner's allegations were clearly legally sufficient and as Judge Bazelon pointed out in his opinion below they "were supported by affidavits of circumstances which cannot be said to be frivolous" (R. 184). As Judge Bazelon further reminded, the question posed was not whether petitioner will ultimately be successful in proving his allegations or securing the relief he seeks. The single issue here presented is whether the Court will now enforce its firm assurances in *Dennis* that "the way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact." *Dennis* v. *United States, supra,* at 168.

Petitioner's motion involves the impact of certain recognized facts upon the operation of the judicial system. This is an area which this Court has both the right and duty to supervise. The Court cannot ignore the serious impact which the entire contemporary pattern of repressive measures has made upon the administration of justice. The Loyalty Order, in particular, has seriously compromised the right to a fair trial in the District of Columbia. It has created a problem which urgently calls for this Court's correction.[30]

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[30] In addition to the authorities set forth in the affidavits and offer of proof, recent studies emphasize the magnitude of the question:

Two leading social scientists, Marie Jahoda and Stuart W. Cook, respectively Associate Professor of Social Psychology and Chairman of the Graduate Psychology Department of New York University, have investigated the social-psychological consequences of loyalty and security measures on government servants. *Security Measures and Freedom of Thought, An Exploratory Study of the Impact of Loyalty and Security Programs*, 61 Yale L. J. 295 (1952). They conducted interviews with fifteen faculty members from different universities and with seventy federal employees in Washington, D. C. from more than a dozen different agencies ranging in rank from a junior professional to senior officer (p. 296). The investigators found that "the scope of the inquiry could not be limited to the study of the impact of the official departmental loyalty and security procedures, as had originally been planned," since in the minds of those questioned these procedures were "part of a much larger inter-

The government sought below to avoid the impact of the decision of this Court in *Dennis* by suggesting that partiality in the grand jury was perhaps not "*per se* disqualifying" (Brief for Appellee, *Emspak* v. *United States*, p. 26). Moreover, the government suggested that perhaps petitioner had no constitutional right to an impartial grand jury in any event. As Judge Bazelon pointed out below "what the government is proposing is *pro tanto* repeal of

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related complex of formal and informal measures toward the same end" (p. 300).

As the investigators reported:

> "There is hardly a respondent who did not sooner or later mention the name of the Senator from Wisconsin. * * *
>
> "The Hatch, McCarran and Smith Acts were brought into the field of discussions. Speeches in Congress, the role and function of the F.B.I., departmental routine checks, and special investigations; security procedures and loyalty procedures; state and municipal investigating programs; the un-American Activities Committee; the procedures of broadcasting companies and of private industry; the activities of various private organizations self-appointed to improve the Attorney General's list of suspect organizations—they are all mentioned as integral parts of the security measures to which the respondents addressed their comments" (pp. 300-301).

The study pointed out:

> "To perceive all security measures—official and unofficial ones—as inevitably linked with each other means, of course, that people respond not to one singled out for inquiry, but to the whole situation" (p. 301).

Professors Jahoda and Cook found that this "situation" had created an all-pervasive atmosphere:

> "The security situation thus presents to our respondents a complex system of formal and informal social controls in which they discern a variety of motives. How central is this situation in the lives of the persons who are or may be affected by it? Is it an isolated aspect of their experience to which they turn attention only when asked to do so in the course of an interview or when it touches them directly through some immediate issue? Or does it pervade large areas of their thinking and behavior, even when it is not directly in the focus of attention?
>
> "On the basis of the exploratory interviews, we suggest for more thorough inquiry the hypothesis that the security

the Fifth Amendment's assurance of 'a presentment or indictment of a grand jury.'"

A grand jury paralyzed by fear and unable to exercise its free judgment would violate a defendant's "federal constitutional right to a fair and impartial grand jury." *Cassell* v. *Texas*, 339 U. S. 282. This Court has in the past noted that "the grand jury is as valuable as ever in securing * * * 'individual citizens from an open and public accu-

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situation, perceived in the global fashion we have described, is a very salient issue for federal employees in Washington; that it is not confined to an intellectual concern with the problem but pervades the entire atmosphere; in other words, that the security issue has become part of the prevalent climate of thought, and underlies in the form of tacit assumptions many aspects of every day behavior. This saliance is furthermore evident for persons holding very diverse political views" (pp. 303-304).

To exist in this changed climate, the survey indicated:

"The codes of behavior to which our respondents adhere or to which they fear they must adhere are now more specific and concrete than the traditional American way of life would lead one to assume. Apparently these traditional standards for behavior are deemed by many respondents to be inappropriate in the present situation" (p. 306).

Concretely, this was manifested in, for example, "an assumption that a federal employee should avoid not only what the government explicitly vetoes but also what the government does not explicitly approve" (p. 306); precautions such as being "careful in political conversations with strangers" (p. 308); a feeling that "governmental decisions should not be questioned as one did before, but 'what's handed down' should be accepted"; and the idea that "federal employees keep out of discussion on any controversial subject" (p. 309).

Another consequence the investigators found was that "the distinction between *unfounded* and *founded* suspicion is easily blurred" (p. 315), and the growing belief that "where there is smoke, there is fire" (p. 317).

The "essential import" of the "institutionalized pressures enforcing conformity to the new climate of thought," the investigators sum up, "is that the hazards of *being investigated*—even if one is subsequently cleared—are so great that individuals are induced to limit their behavior by avoiding (or trying to avoid) anything that might conceivably arouse anyone's suspicion and thus lead to charges and an investigation" (p. 318).

sation of crime and from the trouble, expense and anxiety of a public trial before a probable cause is established by the presentment and indictment of such a jury, and in case of high offenses it is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions.'" *Ex parte Bain*, 121 U. S. 1. In *Ex parte Bain, supra*, the Court went on to quote approvingly Justice Field in his charge to the grand jury, 2 Sawyer 667:

> "[The grand jury] is designed as a means not only of bringing to trial persons accused of public offenses upon just grounds but also as a means of protecting the citizen against unfounded accusation, whether it comes from government or be prompted by partisan passion or private enmity."

Moreover, the grand jury is both an instrument of great importance to a democratic system of justice and a source of great power. As Judge Bazelon warned below (R. 177):

> "Delegation of such sweeping powers compels a balancing caution in the selection of those who exercise them. Freedom of will and conscience should be a minimal requisite in their selection."

The proper functioning of the grand jury system is not a matter of individual concern. As this Court has pointed out, where a grand jury is not properly constituted "reversible error does not depend on a showing of prejudice in an individual case * * *. The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States*, 329 U. S. 187, 195. As Judge Bazelon stated, petitioner's challenge to this grand jury "touches our democratic insistence on the fair administration of law." The rule of this Court in *Dennis*, as well as insistence upon impartial enforcement of constitutional guarantees, required at a minimum granting petitioner the hearing prayed for.

CONCLUSION

For all of the above reasons the conviction of petitioner should be reversed with instructions for his acquittal and the indictment dismissed.

Respectfully submitted,

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